

Janki Koeri Vs. Jamuna Koeri

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Court : Allahabad

Decided On : Sep-21-1962

Reported in : AIR1963All535

Judge : Kailash Prasad, J.

Acts : Limitation Act, 1908 - Article 144; Uttar Pradesh Tenancy Act, 1939 - Sections 180; Tenancy Law; Uttar Pradesh Zamindary Abolition and Land Reforms Act, 1951 - Sections 21(1) and 202

Appeal No. : Second Appeal No. 1103 of 1958

Appellant : Janki Koeri

Respondent : Jamuna Koeri

Advocate for Def. : M.H. Beg, Adv.

Advocate for Pet/Ap. : R.B. Misra, Adv.

Disposition : Appeal dismissed

Judgement :

Kailash Prasad, J.

1. This is a defendant's second appeal which arises from a suit for possession. The two Courts below found that Dhari Koeri, ancestor of plaintiffs and Sit Basant

were the occupancy tenants of the holding in which the plot in suit was included and they granted an usufructuary mortgage of the plot in suit in favour of Rekha Koeri, predecessor-in-interest of defendants 1st set, in the year 1920. The Courts below, therefore, decreed the plaintiff's claim for possession over the plot in suit on payment of the mortgage money to defendants 1st set within a specified time.

2. The present appeal has been filed by one of the successors-in-interest of the original mortgagee. One of the points raised by the appellant is that the mortgage of occupancy holding being void, the position of the defendant-appellant became that of a trespasser and he can be ejected, if at all, only by a suit under Section 180 of the U.P. Tenancy Act in the Revenue Court. The contention has no force. It has been consistently held by this Court that though the mortgage of an occupancy holding is void, yet the position of the mortgagee inducted to the property under the invalid mortgage is not that of a trespasser. His position, though not strictly that of a mortgagee under the provisions of the Transfer of Property Act, is nonetheless analogous to it. In *Lallu Singh v. Ram Nandan* : AIR1930 All136 , Mukerji, J., interpreting an earlier Full Bench decision of this Court, pointed out that a sub-tenant and an usufructuary mortgagee can be placed on the same footing.

Niamatullah, J., who was also a member of that Full Bench, observed that the transaction of an usufructuary mortgage of an occupancy holding was not valid as a mortgage with all its incidents and subject to the provisions of law relating to usufructuary mortgages, but is valid only so far that the mortgagee could retain possession and enjoy it, as agreed between the parties, a feature which is not peculiar to usufructuary mortgage as such, but was also one of sub-lease or other arrangement under which possession of occupancy holding was made over by the tenant to another without creating an interest or charge in favour of the transferee. In the light of these abundant authorities it is perfectly clear that an usufructuary mortgagee of occupancy tenancy is not a trespasser. Although the mortgage of occupancy holding is not permitted under law, yet the creditor who enters into possession under the invalid mortgage cannot prescribe to any title or rights different from or greater than those created under the invalid transaction through which he was inducted to the property.

3. Another contention of the appellants, and in fact the one on which main stress was laid by his counsel, is that the mortgagees became Asamis under Section 21 (1) (d) of the U.P.Z.A. and L.R. Act and as such they cannot be ejected from the plot in dispute except by a suit in the Revenue Court under Section 202 (c) of U. P. Z. A. and L. R. Act. In the appeal before the lower Appellate Court the defendant raised this point, but the learned Civil Judge held that a mortgagee who was in possession under the invalid mortgage prior to the date of vesting, could not claim to be an Asami under Section 21 (1) (d) of the U.P.Z.A. and L. R. Act. This view does not appear to be correct. I have already held in *Bishwanath Singh v. Sunder*, S.A. No. 737 of 1958, D/- 5-9-1962 (All), that 'mortgagee in possession' within the meaning of Section 21 (1) (d) does not necessarily refer to a creditor who enters into possession under a valid mortgage. The expression 'mortgagee' in the section has been used by the legislature to describe the factual relationship irrespective of the fact whether the transaction is or is not valid as a mortgage with all its incidents and characteristics of a legally valid mortgage. I, therefore, hold that the mortgagees in the instant case acquired the status of Asamis under Section 21 (1) (d).

4. It was next contended that as a result of the findings of the Courts below that the land was mortgaged with the defendants, they became Asamis under Section 21(1)(d) of U.P.Z.A. and L.R. Act. The defendant, therefore, can be ejected only by a suit instituted in Revenue Court under S. 202 (c) of the Act.

5. The contention does not appear to be correct. The law, as it stands at present, confers jurisdiction on the Revenue Court to entertain a suit for the ejectment of an Asami. But the Munsif decided this suit on 7-12-1953 and at that time the suit was cognizable by the Civil Court. A subsequent amendment of Schedule 11 of U.P. Agriculturists Relief Act made in 1955 conferred jurisdiction on an Assistant Collector first class to try such a suit. In my view that amendment will have no effect on the suit from which the present appeal arises. A predominant principle of construction is that a rule of law should be interpreted in such a manner as to avoid, multiplicity of suits. Where Civil Court had jurisdiction to try a suit and in exercise of that jurisdiction the Civil Court of first instance decided it, but during the pendency of the appeal the law was emended so as to take away the jurisdiction

of Civil Court and confer it upon Revenue Court, the amended law is not to be applied in determining the appeal. To do so would mean applying the amended law retrospectively with the resultant consequence of multiplicity of suits. Unless the legislature clearly intended the amended law to be retrospective, it should not be given a retrospective effect when it leads to multiplicity of suits. There is nothing in the amendment of 1953 to indicate that the legislature meant it to be retrospective.

In Schedule 11, as originally framed, suits under Section 202 (c) were mentioned at serial No. 8 in the category of cases which were cognizable by an Assistant Collector first class. By Section 66 of the Amending Act (16 of 1953) Clause (c) of Section 202 was deleted from the class of cases cognizable by Assistant Collector first class and it was specifically provided that the amendment was being made with retrospective effect from July 1, 1952. When in 1956 a suit under Clause (c) of Section 202 was again included in the category of cases triable by an Assistant Collector first class by the U. P. Land Reforms Amendment Act (18 of 1956), it was not laid down that the amendment was to be retrospective. This clearly shows that the amendment of 1956 conferring jurisdiction on the Revenue Court was not meant to be retrospective.

6. It was further argued by the learned counsel for the appellant that the Munsif should have referred to the Revenue Court for decision the question of defendants being Asamis as was required by Section 332-B.

7. The section is no longer on the statute. It was added by Section 64 of the U.P. Amending Act (20 of 1954). Earlier the very same section was added by para 6 of the U. P. Amending Ordinance (Ordinance II of 1954), which came into force from 6-8-1954. Thus the procedure for remitting an issue relating to the question of Asami to the Revenue Court was introduced on 6-8-1954. This provision, was not in existence when the Munsif decided the suit. The Munsif, therefore, did not commit any illegality in not referring to the Revenue Court for decision the question of defendants being Asamis.

8. Another contention of the defendants was that the suit filed by the plaintiffs cannot be treated as one under Section 202 (c) of the U.P.Z.A. and L.R. Act;

because in the relief claimed by the plaintiffs it was stated that a decree for possession be granted by the redemption of the mortgage and there was no mention in the plaint that the suit was being instituted under Section 202 (c) of U.P.Z.A. and L.R. Act.

9. I have not been referred to any statutory provision or rule requiring a plaintiff to specify in the plaint the section under which he files a suit. It cannot, therefore, be said that the absence of reference to Section 202 (c) in the plaint vitiates the suit. No doubt, the relief asked for is a decree of possession by redemption of the mortgage, but this alone cannot be a sufficient ground for holding that the suit is not one under Section 202(c) of the U.P.Z.A. and L. R. Act. That section does not prescribe any particular form of the plaint. In order to determine the nature of a suit we have to see the pith and substance of the plaint. In the ultimate analysis of the allegations in the plaint, the claim is for possession over land. What a plaintiff is required to do in a suit under Section 202 (c) is nothing more than to claim possession by the ejectment of the defendants on the ground that the mortgage money has been satisfied or the amount has been deposited in Court. In the instant case the plaintiffs did aver in the plaint that the mortgage money was satisfied and that the defendants be ejected and the plaintiffs be put in possession of the land. The substance of the plaint thus conforms to the requirements of a suit under Section 202 (c). In determining the nature of a suit a Court should look to the substance of the plaint rather than its mere form. While deciding issue No. 9, the Court of first instance held that the defendant had acquired the status of Asami under Section 21(1)(6) of Act No. 1 of 1951 and then it decreed the claim for possession. This clearly shows that the Court of first instance treated the suit to be one under Section 202 (c). It is too late in the day to urge anything to the contrary.

10. Lastly, it was pointed out on behalf of the defendant-appellant that the grounds on which the suit under Section 202 (c) can be filed is that the mortgage has been satisfied or the mortgage money has been deposited in Court. The learned counsel argued that if none of these conditions were fulfilled, the suit could not be maintained. He further elaborated the point by urging that the plaintiff did not deposit the mortgage money before filing the suit and it was found that the mortgage money was not satisfied and so the suit should be thrown out.

11. Of course, the plaintiff did not deposit the mortgage money in Court before instituting the suit. He came with the allegation that the mortgage money was satisfied and that allegation was found to be incorrect. Such a finding cannot, however, entail the dismissal of the suit. Satisfaction of mortgage money is not a pre-requisite of the filing of the suit. It is only a pre-requisite to the ejectment of the defendant; because Section 202 (c) lays down that an Asami shall be liable to ejectment on the ground that the mortgage money has been satisfied or the amount has been deposited in the Court. The decree passed by the Courts below is to the effect that the plaintiff shall be entitled to possession provided he deposits the mortgage money in Court within a specified time. This clearly implies that the defendant is not to be ejected unless the mortgage money is deposited in Court.

12. The interpretation suggested by the defendant has to be rejected for another reason also. It is this that it will lead to multiplicity of suits. As this was a genuine dispute between the mortgagor and mortgagee as to the amount due under the mortgage, the mortgagor will first have to file a suit, if the defendant's interpretation is accepted, seeking a declaration as to the amount that might be found due in respect of the mortgage. After getting the amount declared, he will have to file another suit for possession after depositing in Court the amount declared to be due. This will involve unnecessary multiplicity of suits.

13. The appeal has no force and is dismissed with costs.

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